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Tim themy v. Seagull Enterprises, Inc., A Utah Corporation, Shirley K. Watson, United Bank, A Utah Corporation, Zions First National Bank and Murray Broadcasting Company, . Inc : Respondent's Brief

Utah Supreme Court

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IN THE SUPREME COURT

OF THE STATE OF UTAH

TIM THEMY,

Plaintiff-Respondent,

v.

WAGGON ENTERPRISES, INC.,
Utah corporation, SHERMAN
SON, UNITED BANK,
corporation, ZION
BANK and MURRAY
TRUSTING COMPANY,

Defendants-Appellants.

of the Third

BANK

State Street
Utah 84107

for Defendants
and Appellants

IN THE SUPREME COURT
OF THE STATE OF UTAH

TIM THEM,)

Plaintiff-Respondent,)

v.)

SEAGULL ENTERPRISES, INC.,)
a Utah corporation, SHIRLEY)
K. WATSON, UNITED BANK, a)
Utah corporation, ZIONS FIRST)
NATIONAL BANK and MURRAY)
BROADCASTING COMPANY, INC.,)

Case No. 15641

Defendants-Appellants.)

RESPONDENT'S BRIEF

Appeal from the Summary Judgment
of the Third Judicial District Court in and for
Salt Lake County, Utah
The Honorable David B. Dee, Judge

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IN THE SUPREME COURT OF THE
STATE OF UTAH

TIM THEM,)	
Plaintiff-Respondent,)	
v.)	
SEAGULL ENTERPRISES, INC.,)	Case No. 15641
a Utah corporation, SHIRLEY)	
K. WATSON, UNITED BANK, A)	
Utah corporation, ZIONS FIRST)	
NATIONAL BANK and MURRAY)	
BROADCASTING COMPANY, INC.,)	
Defendants-Appellants.)	

Respondent's Brief

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from the Summary Judgment granted by the Honorable David B. Dee, Judge of the Third Judicial District Court, Salt Lake County, Utah, and entered in the above entitled action on November 2, 1977.

RELIEF SOUGHT ON APPEAL

Appellants Seagull Enterprises, Inc. ("Seagull"), Shirley K. Watson ("Watson") and Murray Broadcasting Company, Inc. ("Murray Broadcasting") have filed this appeal seeking reversal of a Summary Judgment entered by the trial court. It is respondent's position that the lower court's decision should be affirmed.

STATEMENT OF THE FACTS

Generally, appellants' Statement of Facts is accurate; however, respondent believes that the Statement is over-long and contains irrelevant information. In determining whether the trial court correctly ruled that respondent was entitled to summary judgment, it is sufficient to know the following facts:

1. On June 26, 1974, the owner of the KMOR radio station, O. J. Wilkinson, entered into an agreement for sale of the station, including its FCC license, broadcasting equipment, and several acres of land to Seagull. The agreement was evidenced by two written documents, each denominated as "Purchase Agreement". (See paragraphs 6 and 7 of Respondent's Amended Complaint (R. 70-71) and the Answers of Watson and Murray Broadcasting (R. 87) and of Seagull (R. 99).) The agreements were drafted by Seagull's attorneys. (R. 327.)

2. Both Agreements, which obviously drew heavily on the language of the standard Uniform Real Estate Contract, provided for forfeiture in the event of buyer's default (R. 10, 17).

3. Subsequent to payment of the initial downpayment required under the two Agreements, Seagull made no further payments under the contract (See Respondent's Amended Complaint, paragraph 10 (R. 72) and the Answer of Seagull (R. 99)) There is no evidence that Seagull or any of its successors ever tendered any further payments under the contract; and indeed, there has

been no such payments. In its memo in Support of Oral Argument (R. 145-150) Seagull freely conceded that it was in default under the Agreements. (R. 145, first paragraph.)

4. Because of Seagull's default under the Agreements, on September 4, 1975, Wilkinson served notice upon Jay Gardner, Seagull's process agent and Vice President, of his election as seller to treat Seagull's interest in the license and the real and personal property as having been forfeited. (R. 309-310, 358-362.)

5. On May 26, 1976, Wilkinson entered into an installment sale contract with respondent for sale of the real and personal property and the license. Wilkinson also assigned respondent his interest in the two Purchase Agreements with Seagull. (Deposition of Tim Themy (R. 283), pp. 7, 8, and Exhibits 1-4 attached thereto.)

6. On March 8, 1977, Seagull sold the FCC license and broadcasting equipment to Watson dba Murray Broadcasting Company (R. 313-314, 363-365, 393.)

7. Watson subsequently sold the license and equipment to Murray Broadcasting under the terms of a "Proposal" dated April 16, 1977. (R. 415-416.)

8. On September 2, 1977, respondent's counsel served a letter upon Mr. Gardner which confirmed the fact that respondent, as Wilkinson's assignee, intended to treat Seagull's default as a forfeiture. (R. 61 and unnumbered attachments filed with this court June 29, 1978.)

9. Based upon the foregoing facts and pursuant to respondent's Motion for Summary Judgment the trial court entered its judgment in favor of respondent on October 25, 1977. (R. 173-174.) The Judgment provided that appellants' interest in the real and personal property and in the FCC license had been forfeited and that respondent was the owner thereof subject to the security interest of O. J. Wilkinson.

ARGUMENT

POINT I

THERE ARE NO DISPUTED MATERIAL ISSUES OF FACT

Predictably, appellants argue that entry of summary judgment against them was inappropriate because there existed disputed issues of material fact. The principal "disputed facts" relied upon by appellants are as follows:

- A. THE EVIDENCE IS UNDISPUTED THAT RESPONDENT IS THE SUCCESSOR IN INTEREST TO THE SELLER UNDER THE PURCHASE AGREEMENTS.

Appellants state that "respondent's standing as the proper party plaintiff was a material fact as to which there was a genuine dispute between the parties". This assertion is belied by the deposition of Tim Themy (R. 283). (For reasons unknown to the parties to this action, Mr. Themy's deposition was sealed at the time it was filed with this court. However, by an Order dated August 10, 1978, the deposition was unsealed and published.) An examination of Mr. Themy's deposition shows the following:

a) By a Uniform Real Estate Contract dated May 26, 1976, respondent contracted to purchase the real and personal property and the FCC license, all of which are the subject matter of this lawsuit, from O. J. Wilkinson. (Themy Deposition, p. 7 and Exhibit 1.)

b) By an Assignment of the same date Wilkinson also assigned his interest in the Purchase Agreement for sale of the broadcasting equipment and FCC license as well as his interest in the license and personal property to respondent. (Themy Deposition, p. 18 and Exhibit 2.)

c) Subsequently, by Assignment dated July 6, 1977, Mr. Wilkinson also assigned his interest in the Purchase Agreement for sale of the real property to respondent. (Themy Deposition, p. 20 and Exhibit 4.)

Since appellants have produced no evidence contradicting respondent's claim to be Wilkinson's successor, the court's apparent recognition of this fact was correct.

The above facts were specifically cited in respondent's Memorandum of Points and Authorities submitted below in support of his Motion for Summary Judgment. (R. 163, ¶ 6.) Appellants at that time neither objected to respondents use of the Themy deposition, nor attempted to place in issue the truthfulness of the testimony contained therein. Appellants may not now on appeal for the first time raise the issue of the sufficiency of the deposition. This principal has been recognized by this court

on several occasions. See, for example, Meyer v. Deluke, 23 Utah 2d 24, 457 P.2d 966, 969 (1969) and Radley v. Smith, 6 Utah 2d 314, 313 P.2d 465, 468, (1957).

Quite apart from the Themy deposition, respondent's interest in the Purchase Agreements was also demonstrated by the Affidavit of Steven H. Gunn (R. 161) to which were attached the Contract and Assignments found also in the Themy deposition. Thus the court had ample evidence of respondent's interest.

Appellants also contend that prior to consummation of the transaction between respondent and O. J. Wilkinson, Mr. Wilkinson assigned his interest in the Purchase Agreement to Zions First National Bank. (See appellants' discussion of this point at pages 12 and 13 of their Brief.) While no authority is cited for this proposition, appellants apparently make reference to an assignment dated August 3, 1976, wherein O. J. Wilkinson assigned his interest in the Purchase Agreement relating to real property to Zions First National Bank to secure payment of a Trust Deed Note. (Themy Deposition, Exhibit 5.) Since the Assignment in question relates only to the Purchase Agreement as to the real property, but makes no reference to the company's Agreement for sale of the license, appellants are certainly incorrect in asserting that the broadcasting equipment and the FCC license are in any way affected. In any case, since the Assignment is not absolute, but rather was given for the purpose of securing payment of an obligation owed by Wilkinson to the

Bank, it does not demonstrate that Wilkinson divested himself of all interest in the Purchase Agreements prior to his Assignments to respondent.

Appellants play a final novel variation on this same theme when they contend that under the Agreement once the FCC approved transfer of the license to Seagull, Wilkinson relinquished all interest therein. (See Appellants' Brief, pp. 14-15.) Appellants cite no evidence in support of this proposition. Indeed, they did not even bother to raise the issue below. Thus, their right to rely on this theory appears to have been waived. Meyer v. Deluke, and Radley v. Smith, supra.

But even if this issue had been timely raised, it is unsupported by any reasonable reading of the Purchase Agreements.

While the terms of the sale of the KMOR radio station were contained in two separate Purchase Agreements, it is clear that the sale was considered by the parties to be a single transaction. Thus, for example, the two Agreements contain cross-default provisions. (See R. 11, ¶ 10; R. 18, ¶ 18.) It is similarly clear that the tangible assets of the station would be of minimal value standing alone without the broadcasting license. It is therefore ridiculous to contend, as appellants do, that the seller's remedies under the Agreements were terminated upon receipt of FCC approval of the transfer. To accept this view is to accept the proposition that the seller actually intended to sell the station for the amount of the downpayment.

Furthermore, appellants' theory is directly contradicted by the Agreements themselves which state:

In the event of a failure to comply with the terms hereof by the Buyer or upon failure of Buyer to make any payment or payments when the same shall become due or within 90 days thereafter, the Seller, at his option shall have the following alternative remedies . . .

(R. 10, 17.)

According to this provision the seller's remedies may be exercised at any time subsequent to ninety days after default. But if appellants' interpretation were adopted, the buyer would be without remedy as to a default in the license Purchase Agreement once FCC approval had been obtained. There is nothing in the Agreements to indicate that this was the intent of the parties.

B. RESPONDENT PROPERLY INVOKED THE FORFEITURE PROVISIONS CONTAINED IN THE PURCHASE AGREEMENTS.

On September 1, 1977, respondent's counsel delivered a notice of default to Jay Gardner, a vice president of Seagull Enterprises, and station manager of the KRPQ radio station operated by Murray Broadcasting. The letter, which was addressed to Seagull Enterprises, stated:

Because of some confusion which appears to exist as to ownership of the seller's interest under the Purchase Agreements dated June 26, 1974, and as to the exercise of the seller's remedies under these Agreements, we hereby give you notice of the following:

First, our client, Tim Theymy, has purchased the seller's interest under the contracts. Attached to this letter, you will find copies of the assignments to Mr. Theymy.

Second, Mr. Wilkinson, the original seller, has already notified you of his election to treat the default in payment as a forfeiture of Seagull's interest in the real and personal property and in the FCC license. You are hereby notified that Mr. Theymy has also elected to treat Seagull's default as a forfeiture. However, because of conflicting information as to the alleged waiver of Mr. Wilkinson's earlier notice, Mr. Theymy has agreed to give you five days from the day of this notice to remedy the deficiency by bringing all payments current.

As of August 1, 1977, the balance due under both contracts is \$120,951.66. This notice is not intended to waive any of our client's rights under the earlier notice.

Third, we do not make demand upon you at this time to vacate the real property. However, your vacating of the property may be required at such time in the future as will best protect our client from loss of the FCC license. Mr. Theymy's failure at this time to reenter the property is not intended as a waiver of his right to exercise such right of reentry in the future.

Finally, Mr. Theymy hereby reconfirms the earlier Notice of Default and Intent to Foreclose which was served upon you. We still intend to pursue this remedy in the event that the court proves unwilling to enforce the seller's forfeiture remedy.

Sincerely,

/s/

(R. 161, as supplemented by the attachments subsequently filed with this court on June 29, 1978, pursuant to court order.)

As indicated in the above letter, prior to service of the above notice, on September 9, 1975, O. J. Wilkinson had also served Notice of default and intent to seek forfeiture of Seagull's interests under the Purchase Agreements. Copies of these notices may be found at pages 358 and 361 of the

Appellants contend that the earlier notices sent by Wilkinson had no legal affect, because Wilkinson allegedly subsequently waived his forfeiture remedy. Whatever the truth of such an allegation may be, it is clear that respondent, as successor in interest to Wilkinson, by his letter of September 1, 1977, revoked any such waiver and re-invoked the forfeiture remedy earlier relied upon by Wilkinson.

Furthermore, the notice of September 1, 1977, standing alone is legally sufficient to invoke the forfeiture remedy under the Purchase Agreements. In pertinent part, the Agreements provide as follows:

DEFAULT OF BUYER. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within 90 days or after, the Seller, at his option shall have the following alternative remedies:

A. Seller shall have the right upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option reenter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land, becoming property of the Seller, the Buyer becoming at once a tenant at will of the Seller . . .

(R. 10, 17.)

It should be noted that the above provision requires only the giving of "written notice" followed by a five day

period for the remedying of the alleged breach. No special requirements concerning the writing are imposed by the Agreements.

Appellants contend that respondent's Notice was deficient because 1) It was served subsequent to institution of the proceedings below; 2) It was addressed to Seagull -- but not to Watson and Murray Broadcasting; 3) It fails to indicate that Seller was released from all obligations under the contracts; 4) It fails to advise that the purchaser had become a tenant at will; and 5) It reconfirmed the fact that respondent intended to treat the agreement as a mortgage and to foreclose thereon in the event the court failed to grant forfeiture. (Brief of Appellants, p. 18.)

In considering these allegations, it is important that the court understand that at no time in the proceedings below did appellants ever challenge the legal sufficiency of the notice of September 1, 1977. (See, for example, the Memorandum of appellant Seagull in opposition to respondent's Motion for Summary Judgment, R. 145-147 and the Memorandum of appellants Watson and Murray Broadcasting in support of their Petition to Reform the lower court's summary judgment, R. 176-178.) Thus, under the rule in Meyer v. Deluke, supra, this issue may not now be raised for the first time on appeal.

In any case, appellants' arguments as to the sufficiency of the Notice are clearly erroneous. Respondent will consider these allegations in the order presented in appellants' Brief.

Timing of the Notice

Appellants contend that because the Notice was served after commencement of this action, it was invalid. No authority has been presented for this dubious proposition. Indeed, respondent knows of no such authority. Since the Purchase Agreements require only the giving of notice, without reference to any legal action, respondent respectfully suggests that its notice fulfills the requirements of the contracts.

Lack of Service Upon Watson and Murray Broadcasting

Watson and Murray Broadcasting were not parties to the Purchase Agreements. Those contracts require only the giving of written notice to the buyer (Seagull). Under the contracts therefore, it was not necessary to notify any successor in interest of the buyer. Furthermore, since the Notice was served upon Jay Gardner, a manager employed by Murray Broadcasting, at the offices of Murray Broadcasting, it can hardly be said that Murray Broadcasting and Mrs. Watson, the president of the corporation, were without notice of the receipt of respondent's letter. Indeed, neither Watson nor Murray Broadcasting has alleged that it was without notice.

The Notice Contents

Appellants allege that the notice was insufficient because it failed to inform them that by virtue of the invocation of the forfeiture remedy, they were tenants at will and that Seller under the Purchase Agreements was released from all obligations thereunder. Since the Agreements themselves are

silent as to the contents of the notice, it is difficult to understand wherein appellants find such a requirement. Respondent has been unable to find any statute which relates to this question. In addition, in no opinion of this court of which respondent is aware has it ever been required that the seller give the type of information suggested by appellants. On the contrary, in Pacific Development Co. v. Stewart, 113 Utah 403, 195 P.2d 748 (1948) the court quoted with approval the language of a notice given by a seller in invoking the forfeiture remedy of a Uniform Real Estate Contract. In pertinent part the letter stated that the purchaser was in default in a specified sum and that unless the buyer corrected the deficiency within the prescribed time "the seller elects to declare said contract forfeited in accordance with the terms thereof." Id. at 749. Since respondent's letter also gives notice of the default, lists the amount of the delinquency, sets forth the time within which the deficiency must be remedied, and states that respondent elects the forfeiture remedy, it clearly meets the requirements of Pacific Development Co. v. Stewart, supra.

Election of Remedies

The notice of September 1, 1977, makes reference to the fact that respondent, if unsuccessful in obtaining forfeiture, would seek foreclosure. Such a statement can hardly be said to constitute an election of the foreclosure remedy. On the contrary, the notice makes it clear that the foreclosure remedy will only be

resorted to if the court proves unwilling to enforce forfeiture.

For the above reasons appellants are clearly in error when they state that a material issue of fact remains which could have prevented the lower court from entering summary judgment.

POINT II

THE COURTS OF THIS STATE HAVE THE POWER TO ADJUDICATE THIS CONTROVERSY

In points I and II of their Brief, appellants in various contexts raise the question of whether the courts of this State may adjudicate a controversy relating to the disposition of an FCC license. This was also essentially the only issue raised by appellants below. (See Watson's and Murray Broadcasting's Memorandum in Support of Petition (R. 176-178).) Rather than replying to this issue in a disjointed fashion respondent will treat it as a separate point in this Brief.

In considering this issue it must be understood that disposition of an FCC license has really two facets. First, there is typically an agreement between the seller or assignor of the license and the buyer/assignee. Second, any transfer of the license is subject to FCC approval. In objecting to the ruling of the lower court, appellants choose to focus upon the fact that any attempt to transfer the license in this case to respondent or his nominee is subject to FCC approval. They point out, quite correctly, that no state court can order the FCC to approve such transfer. Thus, in Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092 (1945) the Supreme Court held that a state court decision had exceeded

the jurisdiction of that court by requiring the parties to "do all the things necessary to secure a return of the license". Id. at 2101. Nevertheless, the Court affirmed the trial court's order that the physical facilities of the station be retransferred to the lessor/plaintiff, because of fraud in the inducement in the underlying contract. In defining the powers of the state court the Supreme Court stated:

We have no doubt of the power of the Nebraska Court to adjudicate, and conclusively, the claim of fraud in the transfer of the station by the [plaintiff] to [defendant] and upon finding fraud to direct a reconveyance of the lease to the [plaintiff]. And this, even though the property consists of license facilities and the [plaintiff] chooses not to apply for re-transfer of the radio license to it, or the Commission, upon such application, refuses the retransfer. The result may well be the termination of the broadcasting station. Id. at 2101.

Similarly, in Regents of Georgia v. Carroll, 338 U.S. 586, 70 S. Ct. 370, 94 L. Ed. 363 (1949), the Supreme Court affirmed the validity of a contract of purchase between the licensee and the owner of the station, even though the FCC had required the licensee to disaffirm the contract as a pre-condition to renewal of the license. In affirming the lower court's decision the court stated:

The Commission may impose on an applicant conditions which it must meet before it will grant a license, but the imposition of the conditions cannot directly affect the applicant's responsibility to a third party dealing with the applicant.

Id. at 374.

The case of Stenger v. Stenger Broadcasting Corporation, et al, 28 F. Supp. 407 (M.D. Pa. 1939), contains a clear statement as to the relationship between the courts and the Federal Communications Commission concerning the disposition of a broadcasting license. There the purchaser of the assets of the station, including the license, had sought specific performance of the contract of purchase in the state court. The purchaser also obtained an injunction preventing the license holder from assigning the license to third parties. In response, the licensee brought an action in the Federal District Court to require the purchaser to return management and control of the station to him. The purchaser moved to dismiss the Federal action. In ruling on this motion the court stated:

The fact that the subject of these contracts is a radio station, which must be operated in accordance with the terms of the [Federal Communications] Act, is merely incidental. No ground for Federal jurisdiction is alleged and no Federal question is raised. This aspect of the case is simply a matter of interpreting and enforcing a contract, and this can be accomplished through the equity proceedings which are now pending in the [state court].

Id. at 408.

The rule which thus emerges from these decisions is that in any transaction dealing with the sale or assignment of an FCC license, the courts are free to determine the relative rights of the parties including the "ownership" of the license. However, the ultimate decision as to whether or not a license be transferred rests with the Federal Communications Commission.

Thus, one seeking to rescind, reform, invalidate, or specifically enforce a contract for sale of an FCC license must obtain the appropriate relief in the courts and then seek confirmation of the relief by the Commission. This conclusion is supported by the FCC itself. In a letter dated May 14, 1976, over the signature of Wallace D. Johnson, Chief, Broadcast Bureau, Federal Communications Commission, the position of the Commission was summarized as follows:

[T]he Commission has consistently held that it is not the proper forum for the resolution of private contractual disputes . . . "Thus as a long-standing policy, the Commission does not assume jurisdiction in contractual or debtor-creditor controversies involving broadcast licenses, recognizing that such matters are generally private in nature and appropriately left to the local courts for resolution.

(R. 149.)

In the instant action, the court below in its summary judgment of October 25, 1977, held as follows:

The interests of defendants Seagull Enterprises, Inc., Shirley K. Watson, United Bank and of Murray Broadcasting Company, Inc. in the FCC license described in and arising out of the Purchase Agreement for sale of the broadcasting equipment and license dated June 26, 1974, are forfeited by virtue of the default of the buyer thereunder. Plaintiff is the owner of such interests subject to the security interest of O. J. Wilkinson.

(R. 173.)

By its ruling the court attempted only to determine the contractual rights of the parties under the Purchase Agreement. The Court did not attempt in any way to require the

Federal Communications Commission to approve transfer of the license to plaintiff; nor did it attempt to require appellants to undertake such a transfer. The judgment entered below is therefore clearly within the recognized powers of a court to determine the rights or the parties to a contract relating to an FCC license. Radio Station WOW v. Johnson, Regents of Georgia v. Carroll, supra.

POINT III

THE LOWER COURT'S JUDGMENT OF FORFEITURE IS IN HARMONY WITH PRINCIPLES ESTABLISHED BY THIS COURT IN SIMILAR ACTIONS.

Point II of appellants' brief is devoted to the proposition that "the lower court erroneously forfeited appellants' interest in and to the prior payments made prior to the Purchase Agreements" (Appellants' Brief, p. 19.) Appellants point to statements by this Court that forfeiture provisions will not be enforced if they constitute a penalty, and from this rule conclude that the lower court erred in granting forfeiture in the instant case.

Appellants' argument appears to be based upon a misapprehension of both the facts of this case and of the law. A careful analysis of Utah Supreme Court decisions relating to forfeitures under installment sale contracts reveals that such forfeitures have a dual impact. Typically, the party to the contract seeking forfeiture seeks not only a forfeiture of the defaulting party's interest in the property described in the contract, but also a forfeiture of all payments under the

contract. The issue of unconscionability raised in such cases inevitably goes to the question of whether the seller will be allowed to keep all or a portion of sums previously paid by the buyer. See, for example, Johnson v. Carman, 572 P.2d 371 (Utah 1977), and Fullmer v. Blood, 546 P.2d 606 (Utah 1976).

The issue of unconscionability may be raised by the buyer in the form of a suit to recover sums previously paid under the contract, Johnson v. Carman, supra, or as an affirmatively pleaded defense in an action brought by the seller. Fullmer v. Blood, supra. While this court on occasion has found that forfeiture payments made by the buyer would be unconscionable (Perkins v. Spencer, 121 Utah 474, 243 P.2d 446 (1952)), respondent has found no Utah case where the court, having determined that the forfeiture remedy was properly invoked, refused to recognize forfeiture of the buyer's interest in the property. Accordingly, there is no support in Utah law for appellants' assertion that the alleged unconscionability should result in a reversal of the trial court.

Notwithstanding appellants' assertion that the trial court decreed forfeiture of the \$79,000 downpayment paid by appellants to O. J. Wilkinson, an examination of the Summary Judgment reveals that, the court did not address itself to this question. The Judgment simply states that appellants' interest in the real and personal property and in the FCC license was forfeited. Thus, appellants' reliance on such cases as Perkins v. Spencer, supra, is misplaced. If appellants believe that they

are entitled to return of their downpayment, they may bring an action against Wilkinson. But the issue of unconscionability has no relevance in the instant case.

A further weakness in appellants' argument lies in the fact that the issue of unconscionability was not raised below-- either in the context of appellants' pleadings or as an argument in the proceedings relating to respondent's Motion for Summary Judgment. Thus, under the rule that a new theory may not be raised for the first time upon appeal, appellants' argument must be disregarded. Meyer v. Deluke, supra.

Finally, respondent wishes to point out to this court that appellants at no time attempted by affidavit or otherwise to demonstrate that forfeiture of its \$79,000 downpayment would be unconscionable. Indeed, in view of the fact that appellants had use of the FCC license and had the possession and use of the broadcasting equipment and real property from the date of the Agreements (June 26, 1974), to the present, forfeiture of the downpayment can hardly be said to be unconscionable.

POINT IV

THE SUMMARY JUDGMENT DOES NOT EXCEED THE RELIEF PRAYED FOR IN RESPONDENT'S AMENDED COMPLAINT

Appellants state in Point III of their Brief that the forfeiture of the FCC license declared by the court in its Summary Judgment was inconsistent with the relief prayed for in respondent's Amended Complaint. Respondent confesses that he is at a loss to understand the nature of appellants' objection. The relevant prayer in plaintiff's Amended Complaint states:

Wherefore, plaintiff prays for a declaratory injunction (sic) determining plaintiff to be the equitable owner of the license and equipment described above and further adjudging defendants Seagull, Watson, United Bank and Murray Broadcasting Company to be without interest therein.

(R. 75.)

While it may perhaps be argued that reference in the prayer to a "declaratory injunction" rather than to a "declaratory judgment" may be somewhat misleading, prior reference in paragraph 26 of the Amended Complaint to Utah's Declaratory Judgment Act, sections 78-33-1, et seq., made it clear that respondent sought a declaratory judgment concerning the rights of the parties under the Purchase Agreements.

Similarly, it is clear that the court is empowered under the Declaratory Judgment Act to grant the relief requested. Section 2 of that Act states:

Any person interested under a . . . written contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status or other legal relations thereunder.

Section 78-33-2, Utah Code Ann. (1953).

Since respondent, by his Amended Complaint sought a determination as to his rights and the rights of appellants under the Purchase Agreements, and since the Summary Judgment made a determination as to those rights, the court clearly acted properly.

Appellants also see some significance in the fact that in his Third Claim for Relief respondent prayed for the issuance of a mandatory injunction requiring appellants to assist respondent in obtaining transfer of the FCC license. Appellants point out (probably correctly) that such relief, if granted, would be in violation of the rule laid down by the Supreme Court in Radio Station WOW, Inc. v. Johnson, supra that a court may not force an unsuccessful litigant to cooperate in divesting itself of its license. However, since the lower court did not grant the mandatory injunction prayed for, the question is, at best, academic.

POINT V

THE LOWER COURT ACTED PROPERLY IN GRANTING RESPONDENT'S MOTION FOR APPOINTMENT OF A RECEIVER

By an Order dated March 16, 1978, the lower court appointed a receiver of the real and personal property and of the broadcasting license. The order empowered the receiver to take control of the station and to seek FCC approval for re-transfer of the broadcasting license to respondent or his nominee. Appellants argue that the establishment of the receivership exceeds the power of the court and intrudes upon the power of the Federal Communications Commission. Neither of these arguments is tenable.

Rule 66 (Receivers), Utah Rules of Civil Procedure states in pertinent part:

(a) Grounds for Appointment. A receiver may be appointed by the court in which an action is pending or has passed to judgment:

. . .

(3) After judgment to carry the judgment into effect.

(4) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution when an execution has been returned unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment.

Since the Summary Judgment of October 25, 1977, forfeited appellants' interest in the property and license and recognized respondent as the owner of that property and the license, it is clear that the subsequent appointment of a receiver for the benefit of respondent was simply intended to carry the judgment into effect, and that the Order was therefore within the authorization of Rule 66(a)(3).

Furthermore, inasmuch as appellants appealed from the Summary Judgment, it is manifest that Rule 66(a)(4) permits the appointment of a receiver during the pendency of their appeal. Thus, the Rules of Civil Procedure clearly empowered the trial court to establish a receivership in this case.

While not apparently denying this fact, appellants argue that the receivership was unnecessary, since "respondent in his own name and on his own behalf, may apply to the Commission for retransfer of the subject broadcasting license without the intervention of a third party receiver." (Brief of Appellants,

p. 26.) Thus, appellants apparently would not object if respondent were to seize the real and personal property and broadcasting license, but object to a procedure whereby the property and license is seized by a receiver for the benefit of respondent.

As a practical matter, respondent wishes to inform this court of his understanding that FCC rules require that an involuntary transfer of a broadcasting license be accomplished by means of the use of a receiver. This procedure has received tacit approval by at least one court. In LaRose v. Federal Communications Commission, 494 F.2d 1145 (D.C. Cir. 1974), the Circuit Court of Appeals for the District of Columbia acknowledged the propriety of the appointment of a receiver in bankruptcy to take transfer of an FCC license and to sell it (subject to FCC approval) to a third party. The court does not appear to have been concerned with the question of whether such an involuntary transfer to a receiver was valid, but rather addressed itself to the question of whether, having rejected one potential buyer, the FCC was required to consider a second application initiated by the receiver. Nonetheless, the decision demonstrates the court's attitude of approval concerning the involuntary transfer of an FCC license to a receiver.

Apart from this benefit of a receivership, it should also be pointed out that if appellants were to suddenly abandon the use of the license, a receiver would be clothed with the

power to resume operation of the station without immediate danger of loss of the license.

But in the last analysis, whether or not an involuntary transfer can be accomplished directly or only through a receiver is irrelevant. The FCC can surely make its own determination. The only question with which this Court need be concerned is whether under the Rules of Civil Procedure, the establishment of a receivership was justified. Since Rule 66, Utah Rules of Civil Procedure, clearly provides a basis for the granting of the receivership, any arguments as to the necessity of such a receivership for the purpose of obtaining an involuntary transfer are irrelevant.

CONCLUSION

Notwithstanding appellants' obfuscations it is clear that the facts upon which the trial court granted respondent's Summary Judgment remain undisputed. These facts are as follows:

- a. There was a valid contract between the parties to the Purchase Agreements.
- b. Plaintiff has succeeded to the interest of the seller; appellants Watson and Murray Broadcasting to the interest of the buyer.
- c. There was a default under the contract which was never remedied.
- d. The contract provided for forfeiture in the event of default.

e. Respondent properly invoked his right of forfeiture.


Thus the lower court's Summary Judgment was appropriate.

But there is an equitable aspect to this case which respondent has not emphasized in replying to appellants' arguments. Both appellants and respondent have contracted with O. J. Wilkinson to purchase the radio station. Appellants have taken possession of the station and have operated it for several years without making any payments under their contract. They have not even offered to make such payments. Instead, they brazenly inform the courts of this state that they are without power to punish or remedy the breach.

By contrast, respondent who has faithfully performed his contract has nothing. Respondent respectfully petitions this Court to rectify this injustice by affirming the lower court's judgment.

DATED this 11th day of August, 1978.

RAY, QUINNEY & NEBEKER


Steven H. Gunn

MAILING CERTIFICATE

I hereby certify that two copies of the foregoing ^{was} delivered to GARY A. FRANK, attorney for Appellants, by depositing a copy of the same in the U. S. Mails, postage

prepaid thereon, this 17th day of August, 1978.

Steven H. Gunn